Independence and Impartiality of Arbitrators in the Court of Arbitration for Sport

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I hereby declare that the work submitted is mine and that where I have made use of another's work, I have attributed the source(s) according to the Regulations set in the Student's Handbook.

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Abstract

This dissertation was written as part of the LLM in Transnational and European Commercial Law, Banking Law, Arbitration/Mediation at the International Hellenic University.

The dissertation is envisioned to be a comprehensive and systematic take on the matters of independence and impartiality of arbitrators in international arbitral proceedings on the one side and matters relating to independence and impartiality of arbitrators in arbitral proceedings before the Court of Arbitration for Sports (CAS) on the other side. Recent court decisions refusing enforceability of arbitral Awards of CAS have sent shockwaves through the international sports arbitration scene that have initiated a revision of CAS Statute. The goal of this dissertation is to explain and analyze the principles of independence and impartiality, the impact of procedural rules on the independence and impartiality of individual arbitrators and point out problematic matters for independence and impartiality of arbitrators in CAS arbitration.

The dissertation is divided into four chapters. The first chapter seeks to define independence and impartiality in international commercial arbitration from various arbitral and state court cases and the views of the legal profession. The second chapter pinpoints the importance of independence and impartiality in general and in sports arbitration. The third chapter is a brief overview of the history of CAS and its Rules. The fourth chapter is an elaboration on the present-day status of the CAS and court practice that is shining the light on the principles of independence and impartiality from a different perspective.

Dr Friedrich Rosenfeld as the supervisor of this LL.M. dissertation made a contribution by virtue of his keen practical knowledge from arbitral proceedings and I am thankful for the opportunity to write my dissertation under his guidance and support.

Keywords: International Commercial Arbitration, Court of Arbitration for Sports, CAS, Independence, Impartiality.

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Contents

List of abbreviations

New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958	New York Convention
United Nation Commission on International Trade Law	UNCITRAL
European Convention on Human Rights 1950	ECHR
European Court of Human Rights	ECtHR
London Court of International Arbitration	LCIA
Danish Institute of Arbitration	DIA
Court of Arbitration for Sport	CAS
International Chamber of Commerce	ICC
Swiss Federal Statute on Private International Law	Swiss PILA
Convention on the Settlement of Investment Disputes between States and Nationals of Other States 1965	ICSID Convention
World Anti-Doping Code	WADC
World Anti-Doping Agency	WADA
Swiss Federal Tribunal	SFT

1. Introduction

This dissertation addresses the following topic „Independence and Impartiality of Arbitrators in the Court of Arbitration for Sport". Part 1 examines the obligation of independence and impartiality in international commercial arbitration from various arbitral and court proceedings and from the views of the legal profession because it is an obligation bestowed upon every arbitrator by numerous laws and rules (see p. 3.).[1]

Part 2 explains the importance of independence and impartiality in general and in sports arbitration as it is widely acknowledged that the selection of an arbitrator by the parties is one of the most crucial decisions which one has to make (see p. 13.).

Part 3 is consisted of a brief overview of the history of CAS and its rules which are necessary for understanding the current status of CAS (see p. 17.).

Part 4 focuses on the present-day status of CAS as the leading institution in the world in resolving sports related disputes and the current case law that is shining the light on independence and impartiality from a different perspective (see p. 21.).

The conclusion drawn is that there is no significant difference that sports arbitration has in regards to commercial arbitration because different outcomes in recent cases are attributed to an institutional and structural matter of CAS as an institution and not to the individual arbitrators in question (see p. 31.).

[1] *See*, UNCITRAL Model Law on International Commercial Arbitration 1985, amendments 2006 art 12 (1-2); ICC Rules of Arbitration 2017 art 11 (1); UNCITRAL Arbitration Rules 2013 art 11; CAS Code of Sports-related Arbitration 2019 art R33; IBA Rules of Ethics for International Arbitrators 1987 art 3.1; *See also*, Margaret L. Moses, *The Principles and Practice of International Commercial Arbitration* (2nd edn, Cambridge University Press 2012) 135-136.

2. Independence and impartiality of arbitrators

Arbitration proceedings have become one of the most used alternative dispute resolution mechanisms globally and businesses worldwide are aware of the benefits that arbitration could have over State court proceedings. Independence and impartiality of arbitrators in arbitration proceedings have been a topic of great discussion during the past two decades due to the fact that a small number of professionals practice as arbitrators on a regular basis and due to the fact that major law firms and businesses carry the majority of international arbitration cases which could have a detrimental effect on key principles that regulate dispute resolution and could possibly lead to avoidance of arbitration by smaller businesses.

2.1. Overview of independence and impartiality

Historically speaking, it was acknowledged a long time ago that certain procedural rights of due process are guaranteed to an individual when he is a subject of criminal and other court proceedings, even before modern institutional legal frameworks were created, beginning with the Magna Carta in England in the thirteenth century and spanning to The Declaration of the Rights of Man in France.[2] Arbitral proceedings are also widely considered to guarantee due process to every individual party to a dispute, with the core principles being every party's right to be treated fairly and equally, to be given a reasonable opportunity of presenting its case and for the tribunal to be impartial.[3] Unlike court proceedings, arbitral proceedings are envisioned as more flexible and do not contain rules which would regulate in detail each principle of due process. This is why international arbitrators have the authority to interpret the rules on a case-by-case basis with the risk of having their arbitral Award refused recognition and enforcement if the procedural rights of a party were violated. However, one of the core principles of arbitration, the principles of independence and impartiality of arbitrators are the most important safe keepers of the lawfulness of the arbitral proceeding, recognized at the earliest phases of history such as in ancient Greece where the word for "arbitrator" was synonymous with impartiality.[4]

The maxim *nemo judex in sua causa* is a goal that the principles of independence and impartiality seek to accomplish. The arbitrator's duties to resolve a dispute and issue a final and binding arbitral Award are inherent with his duty to be independent and impartial because he assumes an adjudicatory role. The existence of which circumstances deem an arbitrator dependent on one of the parties or which circumstances make an arbitrator biased could vary on a case by case basis. Ultimately the end result is the same whether the arbitrator in question (member of the panel or

[2] Charles Nairac, *Due Process Considerations in the Constitution of Arbitral Tribunals*, (ed Andrea Menaker (International Arbitration and the Rule of Law: Contribution and Conformity, ICCA Congress Series, Volume 19, ICCA & Kluwer Law International 2017) 121-122.
[3] *Ibid*; UNCITRAL Model Law International Commercial Arbitration 1985, amendments 2006 art 18.
[4] Gary B. Born, *International Commercial Arbitration*, (2nd edn, Kluwer Law International 2014) 1761.

presiding) was dependent on a party or biased, there is the serious threat of a court denying recognition and enforcement of that arbitral Award on the grounds related to the arbitral procedure being unlawful.[5] Many legal systems provide for multiple grounds for the annulment of an arbitral Award, with most of them echoing the grounds for the refusal of recognition and enforcement in the New York Convention article V.[6] The possible legal grounds in the New York Convention that could relate to the violation of the independence and impartiality of an arbitrator are three: Article V(1)(b) New York Convention- the inability to present ones case as a consequence of an arbitrator being biased or dependent; Article V(1)(d)- the composition of the arbitral tribunal which is contrary to the parties agreement and Article V(2)(b)-public policy.[7]

In recent years the trust in arbitration has begun to decline the most in developing countries that look at arbitration as a biased dispute resolution system.[8] This trend poses a threat to arbitration expanding as dispute resolution procedure for the less wealthy countries and businesses.

In order to prudentially analyze the meanings of independence and impartiality, the available case law and the significance of these principles in all arbitral proceedings, which is the main goal of this chapter, it is imperative to firstly address the duty of disclosure of potential arbitrators because of its significance in the pre-arbitration phase. After defining an arbitrator's duty to disclose we will define independence and impartiality according to the relevant legal instruments, international sources and leading cases. Lastly, we will touch upon third party funding as a new phenomenon in international arbitration proceedings for a comprehensive overview of independence and impartiality.

2.2. Duty to disclose

At the beginning of the arbitral proceedings when a future arbitrator is approached for the purpose of resolving a dispute, an obligation for disclosure is activated. This obligation of disclosure is required by many institutional arbitration rules urging the possible arbitrator to address his independence and impartiality at the earliest stage and disclose to the parties any circumstances that likely give rise to justifiable doubts as to his independence and impartiality and without delay.[9] In order to avoid any possible risk of being challenged in the future for the violation of the

[5] Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958 art 5 (1)(d).
[6] Gary B. Born, *International Commercial Arbitration*, (2nd edn, Kluwer Law International 2014) 3164.
[7] Katia Fach Gomez and Ana M. Lopez-Rodriguez (eds), *60 Years of the New York Convention: Key Issues and Future Challenges* (Kluwer Law International 2019) 138-143.
[8] In the last five years three states have denounced the ICSID Convention: Bolivia, Ecuador and Venezuela; *See also* Tony Cole, *The Roles of Psychology in International Arbitration* (International Arbitration Law Library, Volume 40, Kluwer Law International 2017) 340-341.
[9] *See* UNCITRAL Model Law on International Commercial Arbitration 1985, amendments 2006 art 12 (1) "*a person shall disclose any circumstances that likely gives rise to justifiable doubts as to his independence and impartiality*."

principles of independence and impartiality arbitrators should reveal all facts which may reasonably be considered grounds for disqualification.[10] The duty of disclosure is an obligation that is common in all arbitral proceedings which no prospective arbitrator can avoid.[11]

In past years parties were unwilling to challenge an arbitrator even in cases where his independence was reasonably shaken. If a vacancy did occur it was due to the death of an arbitrator or a resignation, however in recent years parties do not hold back to challenge an arbitrator's independence and/or impartiality, sometimes even as a means of guerrilla tactics making things difficult for the arbitral tribunal or to the other party in the proceeding.[12] This could happen at the beginning of the arbitral proceeding in order to disrupt the creation of the arbitral tribunal or during the proceedings if a party wants to impose pressure on an arbitrator for him to vote in the parties favour on the merits of the case.

In practice a prospective arbitrator discloses all information that he deems relevant in an informal way during the first contact with the party seeking to nominate him, this is usually done when the parties interview an individual that they seek to nominate as their party nominated arbitrator. Later, if nominated, the arbitrator submits all relevant information in writing to both of the parties to the dispute giving the counterparty all relevant information in order to assess his independence and impartiality and possibly challenge it.

2.3. Independence: Definitions and case law

After an arbitrator acts according to his duty to disclose relevant information the next step is ascertaining whether or not certain facts exist that pose or could pose a threat to his independence or impartiality. An arbitrator is independent when he has no financial interest in the case or in the outcome of the case.[13] Independence also means that the arbitrator is *objectively* independent of the parties in the dispute, e.g. that he is not an employee of one of the parties or in a professional relationship with one of the parties.[14] The purpose of the independence requirement is to ensure that there are no connections and relations between the party and the arbitrator in order to prevent compromising the arbitrator.

The obligation of independence is regarded as unnecessary in some states. This is the case in the UK, where the obligation of independence was left out of the English

[10] Blackaby Nigel and Constantine Partasides, et al., *Redfern and Hunter on International Arbitration* (6th edn, Oxford University Press 2015) para 4.79.
[11] ICC Rules of Arbitration 2017 art 11 (2)(3); UNCITRAL Arbitration Rules 2013 art 11; LCIA Arbitration Rules art 5.4.
[12] Blackaby Nigel and Constantine Partasides, et al., *Redfern and Hunter on International Arbitration* (6th edn, Oxford University Press 2015) paras 4.89-4.90.
[13] Margaret L. Moses, *The Principles and Practice of International Commercial Arbitration* (2nd edn, Cambridge University Press 2012) 135.
[14] *Ibid*.

Arbitration Act of 1996 because the drafters came to the conclusion that the lack of independence of an arbitrator is of no significance unless it gives rise to justifiable doubts to his impartiality.[15] This, however, does not mean that independence is not covered by the English Law at all because it is contained in the principle of impartiality. Impartiality can be proven only through objective facts, which means that an objective fact needs to exist in order to prove that an arbitrator is being biased and that fact is linked to the arbitrator. The arbitrator could be linked to a party only through the existence of facts such as private dealings of an arbitrator with a party or his continuous professional relationship with a party that gives rise to an unacceptable risk that the arbitrator will be biased. Practically, this means that firstly it is necessary to prove the existence of objective circumstances that by definition are facts that deem an arbitrator dependent on the parties and then weigh out the impact of these facts to the impartiality of an arbitrator. This process needs to be carried out in order for an arbitrator to be deemed partial under the English Arbitration Act of 1996. This uncommon rule of the English Arbitration Act of 1996 could be beneficial to arbitral proceedings because it gives flexibility to the court in deciding when an arbitrator's impartiality is challenged. It gives room for a court to decide contrary to the common practice where even when there are certain connections between an arbitrator and a party to a dispute that these connections may not be of such significance on his impartiality so as to dismiss that individual from being an arbitrator. Especially considering that most arbitrators are chosen by virtue of their personal reputation and morality which assumes that they are aware of any dangers to their integrity and accepted an appointment in good faith.

The Swiss PILA, on the other hand, requires arbitrators to be independent and is silent on the principle of impartiality which is directly opposite to the English Arbitration Act of 1996.[16] The Swiss Federal Tribunal as the competent national court of Switzerland has determined that there is no distinction between the two terms – independence and impartiality.[17]

Arbitrators need to pay attention to every detail about their previous professional and personal engagements and disclose information that may be relevant to their independence and impartiality. Even if potential arbitrators disclose all information each party still has the right to challenge an arbitrator under the rules of the proceedings. The majority of available decisions on the challenges to arbitrators are from institutional arbitrations because many of them provide a procedure for challenging independence and impartiality of arbitrators. When the decisions of such institutional arbitrations are made public they can be used in order to help in similar situations in other cases, which could be greatly beneficial to legal certainty.

The new wave of challenges to the independence and impartiality of arbitrators, a large percent of which are used merely as a procedural tactic, have forced institutions to review the traditional practice that the decisions on the challenges of independence

[15] Gary B. Born, *International Commercial Arbitration*, (2nd edn, Kluwer Law International 2014) 1776.
[16] Swiss Federal Statute on Private International Law 1987 (Swiss), art 180, para 1, subpara c).
[17] Despina Mavromati, Mathieu Reeb, *The Code of the Court of Arbitration for Sport: Commentary, Cases and Materials* (Kluwer Law International 2015) 136.

of arbitrators are confidential and started publishing the redacted challenge decisions in order to clarify to the arbitrators the necessary facts they must disclose, and sway the parties away from challenging when they can assume it will be rejected by the institution (the first institutional arbitration to begin this practice is the LCIA).[18]

Public and available case law from numerous institutional arbitrations provides us with examples of successful and unsuccessful challenges of arbitrators. A case before the English High Court dealt with the issue when a manager of a party to a dispute nominated himself as an arbitrator for the arbitral proceeding, which is obviously a case where the independence of an arbitrator is compromised (see p. 9).[19] The manager was removed from the case as an arbitrator according to the English Arbitration Act of 1950.[20] In one case before the Danish Institute of Arbitration (DIA) a challenge to the independence of an arbitrator was raised based on the fact that the arbitrator was a member of the board of a company during the same time as the claimant's current manager.[21] This challenge was rejected because previous membership on the same board prior to the arbitral proceedings does not raise justifiable doubts about the independence of the arbitrator.[22] In another case before the DIA an arbitrator was disqualified because he had professional ties with the claimant, he was a director and manager in a company that was half-owned by one of the claimants co-owners and managers and the Committee of DIA concluded that these circumstances give justifiable doubts to the independence of the arbitrator in question, ascertaining that an important part of their conclusion is that these circumstances still existed during the time the dispute took place unlike the previous case when the challenge was rejected.[23]

2.4. Impartiality: Definitions and case law

Impartiality commonly means that the arbitrator is not biased, that he is not already subjectively invested in the dispute by having a preconceived notion regarding the issues in the case and that he does not favour one of the parties to the detriment of the other.[24] Impartiality is, therefore, a *subjective* concept and, unlike independence, more difficult to prove as it is essentially a state of mind.[25] Unlike independence that is focused on the relationship between the arbitrator and the

[18] Blackaby Nigel and Constantine Partasides, et al., *Redfern and Hunter on International Arbitration* (6th edn, Oxford University Press 2015) para 4.91.
[19] Gary B. Born, *International Arbitration: Cases and Materials* (2nd edn, Kluwer Law International 2015) 716-718.
[20] *Ibid.*
[21] *See* Steffen Pihlblad and Johan Tufte-Kristensen, *Challenge Decisions at the Danish Institute of Arbitration*, (Journal of International Arbitration, Volume 33, Issue 6, Kluwer Law International 2016) 604-605.
[22] *Ibid.*
[23] *Ibid* 602-603.
[24] Margaret L. Moses, *The Principles and Practice of International Commercial Arbitration* (2nd edn, Cambridge University Press 2012) 134-135.
[25] Blackaby Nigel and Constantine Partasides , et al., *Redfern and Hunter on International Arbitration* (6th edn, Oxford University Press 2015) para 4.78.

parties, impartiality is focused on the relationship between the arbitrator and the matters of the case.[26] Impartiality is quite certainly impossible to establish for outsiders given that it is a state of mind of the arbitrator, therefore requiring a party to prove impartiality with a high degree of certainty would be illusory and impossible given that proof of actual bias is very difficult to obtain.[27]

Impartiality of arbitrators is crucial for arbitration. Some authors even go so far as to state that independence is less relevant than impartiality and that different jurisdictions may choose not to introduce independence in their national laws, unlike impartiality which is crucial.[28] English case law provided for a formula for calculating whether an individual is apparently being biased. The test was first used by the English House of Lords in the *Porter v. Magill* case when Ms Shirley Porter (a politician of the Conservative party) appealed a decision of a lower court stating that an auditor in the case was apparently being biased, namely the test consists of the question what an informed and fair-minded observer would conclude given the facts of the case.[29] Even though this test was first used in litigation, the test of what an informed and fair-minded observer would conclude when informed of the facts of the case has been effectively used for arbitral proceedings in determining impartiality, especially if a motion was made to a Court for the annulment of an arbitral Award.[30] This formula has also been recognized by other jurisdictions. The IBA Guidelines on Conflicts of Interest in International Arbitration from 2014 (IBA Guidelines) recognizes this formula explicitly in its General Standard 2 (b). The courts in the US, on the other hand, have a different standard for bias from their colleagues in the UK and even have different standards between themselves. The US Second Circuit Court requires 'evident partiality', meanwhile the Ninth Circuit Court requires a lower standard of 'an impression of possible bias'.[31]

Case law of eminent institutional arbitrations provides with examples of violations of impartiality on the part of arbitrators. In one case before the DIA an arbitrator was disqualified by the Committee of DIA which believed that his impartiality would be hindered because there was the possibility that a regular client of his law firm will join the case, even though the current situation in the case allowed him to be an arbitrator.[32] Another case involved an arbitrator and a member of the party's counsel that owned a hunting consortium together, none of the parties challenged the arbitrator, however, the DIA Committee initiated *sua sponte* the evaluation of his

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[26] Alfonso Gomez-Acebo, *Party-Appointed Arbitrators in International Commercial Arbitration* (International Arbitration Law Library, Volume 34, Kluwer Law International 2016) paras 4-12.

[27] Karel Daele, *Challenge and Disqualification of Arbitrators in International Arbitration*, (International Arbitration Law Library, Volume 24, Kluwer Law International 2012) 237.

[28] Franz T. Schwarz and Christian W. Konrad, *The Vienna Rules: A Commentary on International Arbitration in Austria* (Kluwer Law International 2009) para 7-096.

[29] Gary B. Born, *International Arbitration: Cases and Materials* (2nd edn, Kluwer Law International 2015) 726.

[30] *See ASM Shipping Ltd. of India v. TIMI Ltd. of England*, [2005] EWHC 2238 para 39.

[31] *See* Tony Cole, *The Roles of Psychology in International Arbitration* (International Arbitration Law Library, Volume 40, Kluwer Law International 2017) 345-346.

[32] Steffen Pihlblad and Johan Tufte-Kristensen, *Challenge Decisions at the Danish Institute of Arbitration*, (Journal of International Arbitration, Volume 33, Issue 6, Kluwer Law International 2016) 611-612.

impartiality and disqualified the arbitrator.[33] Such case law is greatly beneficial to the creation of common standards for challenging and disqualifying arbitrators in international arbitration proceedings.

2.5. IBA Guidelines

In attempting to deal with the issues of independence and impartiality the International Bar Association formed a Working Group that created an important legal instrument for international arbitration, the IBA Guidelines for the Conflicts of Interest in International Arbitration (IBA Guidelines). The IBA Guidelines are not a binding legal instrument (unless the parties agree contrary) but given the fact that the Guidelines contain and promote the best practice in international arbitration, the majority of arbitrators follow the recommendations. The IBA Guidelines apply equally to all arbitrators, whether a sole arbitrator in the dispute, a presiding arbitrator or an appointed arbitrator.[34] IBA had previously issued the IBA Rules of Ethics for Arbitrators in 1987 (IBA Rules) that regulate matters such as disclosure, independence and impartiality, which is why the IBA Guidelines explicitly proclaim that the matters in the IBA Rules are still in effect, except the matters overlapping with the matters in the IBA Guidelines, which are superseded.[35]

The IBA Guidelines consist of two parts. Part One is consisted of 7 General Standards dealing with conflicts of interest, duties of disclosure and waivers, while Part Two provides examples on how the General Standards in Part One should be applied through specified situations.[36]

These situations are divided into three lists: Red List (Nonwaivable and Waivable), Orange List and Green List. The Red List contains nonwaivable situations where the parties in the dispute even if they wish cannot waive their challenge to the independence or impartiality of an arbitrator and the arbitrator must not accept the case because the facts could greatly influence the arbitrator while deciding on the merits of the case, e.g. the arbitrator is a manager in one of the parties.[37] The Red List also contains waivable situations which are by their content borderline situations which parties may waive if they wish, e.g. the arbitrator had prior involvement in the dispute.[38] The Orange list, on the other hand, consists of scenarios that the arbitrator needs to disclose and if the parties do not challenge the arbitrator after the disclosure, it can be considered that they waived the right to object.[39] Finally, the Green List consists of examples where no obligation of disclosure exists, the Working Group believed such situations do not raise questions of independence and impartiality, e.g.

[33] *Ibid* 614.
[34] IBA Guidelines on Conflicts of Interest in International Arbitration 2014, General Standard 7.
[35] *Ibid,* Introduction to the Guidelines, para 8.
[36] Margaret L. Moses, *The Principles and Practice of International Commercial Arbitration* (2nd edn, Cambridge University Press 2012) 137-138.
[37] IBA Guidelines on Conflicts of Interest in International Arbitration 2014, Part II, para1.2.
[38] IBA Guidelines on Conflicts of Interest in International Arbitration 2014, Part II, para 2.1.2.
[39] *Ibid* para 6.

the arbitrator and counsel of one of the parties have previously served together as arbitrators.[40]

The importance of the IBA guidelines is proven by the arbitration practice after its adoption, with the arbitration community profiting the most out of them. Regarding national courts, on the other hand, the practice is different, and the arbitration community needs to be aware that some of the courts may give the IBA Guidelines relevance, but others may not.[41] The Guidelines help any individual when approached to be an arbitrator when he is uncertain whether to disclose some information or not, however, any potential arbitrator needs to be aware that too much disclosure can be a favour for the abusive party, which could see it as an opportunity for its guerrilla tactics. The IBA Guidelines contain explanations of matters that have in recent years posed a problematical topic for independence and impartiality in international arbitration such as third party funding.

2.6. Waivers

Party autonomy is a principle that defines international arbitration. Party autonomy in international arbitration means that the parties have the possibility, albeit to a certain extent, to construct the arbitral proceedings as they wish, they can choose to settle their dispute by an *ad hoc* arbitration or institutional arbitration, decide the number of arbitrators, the applicable law and etc.

Party autonomy also means that the parties can decide not to exercise their rights and they can even waive the exercise of certain rights for the future. However, the parties do not have the absolute freedom to waive the right in challenging an arbitrator. The Nonwaivable Red List of the IBA Guidelines consists of situations where a party's waiver is invalid and does not have a legal effect because of the crucial impact of the circumstances covered there on the independence and impartiality of an arbitrator.[42] Some institutional arbitrations such as DIA have the power to start the procedure of disqualification of an arbitrator *sua sponte,* even if no challenge was made by the parties, thereby enforcing the idea that the minimum standard of independence and impartiality as a fundamental feature of arbitration must be preserved even if the parties do not wish to challenge it, or they simply are passive.[43]

[40] *Ibid* para 4.4.2; *See also* Margaret L. Moses, *The Principles and Practice of International Commercial Arbitration* (2nd edn, Cambridge University Press 2012) 136-141.
[41] *Ibid* 141.
[42] IBA Guidelines on Conflicts of Interest in International Arbitration 2014, General Standard 4 (b).
[43] DIA Rules of Arbitration 2013, art 13 (4).

2.7. Third party funding

In the modern arbitral community, opinions are divided on the matter of third party funding and its consequences on the principles and duties of independence and impartiality of arbitrators. Third party funding is a growing issue that is receiving attention globally due to the problematic characteristics of the endeavour which could possibly have detrimental effects on the arbitral proceeding and which calls for new policy considerations.

"Good arbitration costs a good deal of money."[44]

International arbitration is an expensive endeavour for many businesses that seek to use its conveniences to their benefit. In order to get capital for the arbitration costs, businesses obtain financing from funding companies (funders) that wish to profit from the proceeds if the case is won.

Unlike third party funding of litigation costs, the funding of arbitration expenses is a recent phenomenon. Third party funding in arbitral proceedings poses multiple problems (the artificial inflation of the claim, the discontinuance of the arbitral proceedings etc.), one of which is its impact on independence and impartiality of arbitrators. Namely, the independence and impartiality of an arbitrator could be shaken if the funding of a claim was secured by a funding institution that has multiple cases in its portfolio.

There could be an interconnection between two claims - arbitrator A is appointed by a claimant who is funded by a funder in one case and in another case arbitrator A is a counsel of a party that is funded by the same funder.[45] The arbitrator A may be prone to decide in favour of the claimant in the first case. The level of disclosure of arbitrators is also important to determine. The funding contract between the claimant and the funder may be confidential in which case arbitrator A may be at a conflict between two obligations, the duty to disclose information and the confidentiality obligation with the funder and his client.

Third party funders are defined broadly in the IBA Guidelines:

> *"[…] any person or entity that is contributing funds, or other material support, to the prosecution or defence of the case and that has a direct economic interest in, or a duty to indemnify a party for, the award to be rendered in the arbitration".*[46]

Investment arbitration is the most attractive for claimants and funders out of all types of arbitral proceedings (such as private commercial arbitration proceedings) due to

[44] Jonas von Goeler, *Third-Party Funding in International Arbitration and its Impact on Procedure* (International Arbitration Law Library, Volume 35, Kluwer Law International 2016) 1.
[45] *Ibid* 253.
[46] IBA Guidelines on Conflicts of Interest in International Arbitration 2014, Explanation to General Standard 6 (b).

high costs of investment arbitration proceedings, the high value of investments, lengthy proceedings, the recent global financial crisis and the relative transparency of investment arbitral Awards which funders use to estimate risk and decide whether to credit a party or not.[47] Another important reason why claimants seek funding for their claim is that they want to shift the risk of the negative outcome of the dispute to someone else.[48] Thus, third party funding may provide positive incentives to a claimant in pursuing the case when his financial status does not allow it, thereby providing clear advantages and positive results for accessing justice.

For preserving the independence and impartiality of arbitrators as regards to third party funding it is imperative to define clear rules of disclosure for arbitrators. The significance of the arbitrators duty to inform the parties of possible conflicts of interest, and by that providing them the possibility in challenging the arbitrator, is emphasized by the fact that the arbitral Award can be annulled or denied recognition and enforcement if the relationship between the arbitrator and the funder would be unveiled after the arbitral proceedings have ended. It would appear as if the arbitrator purposely failed to disclose the relationship, and this *appearance* of dependence and partiality is enough to challenge the arbitral Award.[49]

[47] Eric De Brabandere and Julia Lepeltak, 'Third Party Funding in International Investment Arbitration' [2012] 6 available at: <https://ssrn.com/abstract=2078358> or < http://dx.doi.org/10.2139/ssrn.2078358> accessed at 12th August 2019.
[48] *Ibid.*
[49] Blackaby Nigel and Constantine Partasides, et al., *Redfern and Hunter on International Arbitration* (6th edn, Oxford University Press 2015) para 4.134.

3. The importance of independence and impartiality in general commercial arbitration and sports arbitration

Similar procedural rules and procedural solutions exist regarding the status and duties of an arbitrator in general commercial arbitration and sports arbitration, more concretely CAS arbitration. This is why this subsection focuses on outlining the common procedural rules of Europe's established institutional arbitrations in commercial matters on the one hand and outlining the procedural rules of CAS arbitration on the other hand.

3.1. General commercial arbitration

The contractual duties of an arbitrator vary from jurisdiction to jurisdiction because of the different obligations of an arbitrator in regards to the party that nominated him. Such differences are based on the various roles an arbitrator could have that could span from an arbitrator-advocate of the party that nominated him or a non-neutral arbitrator (both of which are allowed to be inclined to the party that nominated them) to an arbitrator that needs to be free from any obligations to the party that nominated him. Also, the parties themselves can specify in the arbitration agreement what is the content of the obligation of independence and impartiality and define if an arbitrator can be predisposed to the party that nominated him.[50]

However, when the parties agree to submit their dispute to an institutional arbitration, the rules of that institution may differ from what the parties agreed, especially if the parties agree that the arbitrators have a status such as an arbitrator-advocate, unfamiliar with the majority of institutional arbitrations in Europe. The conflict between the parties' agreement and the procedural rules of the specific arbitration institution is usually resolved to the benefit of the latter because the rules of procedure of most of the arbitration institutions provide that their rules apply in matters regulated by them e.g. ICC Rules of Arbitration art. 19. The effects of a violation of independence and impartiality on the part of one of the arbitrators may have negative consequences on the rest of the arbitral tribunal and the arbitral Award. Such an issue may arise regarding the validity of the arbitral Award, if only one of the arbitrators was partial, unlike the other two, who were impartial.

If an action for annulment is to be filed on the basis of only one arbitrator being biased, the court could use the "mathematical approach" and decide that one arbitrator's partiality is not enough to annul the arbitral Award, especially if the other two members of the tribunal were impartial.[51] However, this sort of logic is not persuasive because arbitrators are not like machines that follow pure logic, arbitration is a process of discussion and argumentation during which there is no way of

[50] Gary B. Born, *International Commercial Arbitration*, (2nd edn, Kluwer Law International 2014) 1990.
[51] *See* Katia Fach Gomez and Ana M. Lopez-Rodriguez (eds), *60 Years of the New York Convention: Key Issues and Future Challenges* (Kluwer Law International 2019) 148.

separating the influences of one of the arbitrators (the biased one) on the rest of the members of the tribunal.[52] The influence could be significant if the individual in question is of great authority in the particular field of law and any argument of that individual would be of great weight to the other arbitrators. That is why the principles of independence and impartiality are significant in all arbitral proceedings.

Another important question is the significance of the moment in time when challenging an arbitrator's independence and impartiality. The decision on an arbitrator's independence and impartiality may vary if it is rendered at the beginning of the arbitral proceeding by way of an institutional challenge submitted to the administration of the institutional arbitration or if the decision is rendered by a national court after the end of the arbitral proceeding by a motion to annul the arbitral Award on the same grounds. Practice has shown that there is a larger probability of disqualifying an arbitrator when the challenge is submitted at the beginning of the arbitral proceedings than with a motion to a national court, one of the main reasons being that courts are unwilling to annul an arbitral Award that had reached an appropriate result, after time-consuming and expensive arbitral proceedings.[53]

3.2. The importance of independence and impartiality in sports arbitration

The Court of Arbitration for Sport is the single and most significant institution for solving sports related disputes. Such a status CAS has established gradually through the years since its formation (see p. 17) while at the same time consistently developing trust in its authority and competence.

As a leading institution for solving sports related disputes the importance of independence and impartiality in sports arbitration will be outlined according to CAS rules for independence and impartiality in its CAS Code of Sports-Related Arbitration 2019. The CAS Code of Sports-Related Arbitration 2019 proclaims a general obligation of independence and impartiality on its arbitrators in article R33 while also indirectly referencing independence and impartiality in other parts of the Code such as in article S18 which prohibits arbitrators to act as counsel for a party before CAS.[54] Therefore, the CAS Code of Sports-Related Arbitration 2019 does not allow an arbitrator to act as an arbitrator-advocate for the party that nominated him and every other agreement of the parties in the arbitration agreement would be contrary to those procedural rules which govern the arbitration procedure and would be denied legal force.

Such as in English case law which provided for a formula for calculating whether an individual is apparently being biased, the test of what an informed and fair-minded observer would conclude when informed of the facts of the case (see Independence and impartiality of arbitrators - Impartiality p. 7) is what article R34 of the CAS Code of Sports-Related Arbitration 2019 also provides for the assessment of an arbitrator's

[52] *Ibid.*
[53] Gary B. Born, *International Commercial Arbitration*, (2nd edn, Kluwer Law International 2014) 3279.
[54] CAS Code of Sports-Related Arbitration 2019 art R33, para 1 and art S18 para 3.

independence and impartiality.[55] The independence and impartiality of an arbitrator should therefore not be challenged through the subjective perception of the parties but rather by the perception of an informed and fair-minded observer.[56]

Article R34 of the CAS Code, on the one hand, provides the possibility for an arbitrator to be deemed biased if facts exist that give rise to serious doubt even if the arbitrator is not actually being biased and, on the other hand, provides that in order for successfully challenging an arbitrator one must pose concrete evidence that objectively gives rise to serious doubts of the arbitrator's independence and impartiality. The rule will discourage the abusive parties which seek to challenge an arbitrator as a part of their guerrilla tactics. Thus, e.g. merely stating that an arbitrator is an „institutional" arbitrator to the benefit of doping bodies is a personal opinion and is not enough to remove an arbitrator from a panel without any other existing facts.[57]

The history of CAS from its formation as an institution to its modern-day status has been influenced by the desire to be recognized as an independent and impartial arbitration court and the development of its procedural rules have evolved with the specific goal of creating a faith in its arbitrators and its organizational independence from sporting associations as a precondition for a lawful arbitral Award. In order to adequately understand the problems an arbitrator could face regarding his independence and impartiality when acting in CAS arbitration one must understand the structural, organizational and procedural rules of CAS, CAS's award history and the case law of the Swiss Federal Tribunal.

[55] Gary B. Born, *International Commercial Arbitration*, (2nd edn, Kluwer Law International 2014) 726.
[56] Despina Mavromati and Mathieu Reeb, *The Code of the Court of Arbitration for Sport: Commentary, Cases and Materials* (Kluwer Law International 2015) 139.
[57] *Ibid.*

4. The statutory organization of CAS and the rules of procedure

This subsection is aimed at providing a brief history of CAS with an explanation of early problems that CAS had regarding its status as a court of arbitration after which a reform was initiated with the goal of removing any risks to CAS's independence and impartiality. This subsection also reflects on the status of CAS after the reform of its CAS Code of Sports-Related Arbitration and ends with the analysis of CAS's procedural rules.

4.1. The History of CAS

The second half of the 20th century proved to be the most prosperous period for the development of industries and science in human history. As new technology created cultural and social changes in everyone's life, sport benefited the most out of possibilities of wide media coverage and became an industry with great investments and specific legal issues that needed to be dealt with efficiently and expeditiously.

During the '80s there was a need for resolving sport related issues on an international level by an international body that could deal with legal matters relating to sports in a speedy and cost-effective manner.[58] The work on the Statute of CAS began once a working group was established by the International Olympic Committee comprising three members and the IOC officially ratified the Statute of CAS in 1983 which entered into force a year later on the 30th of June 1984 with the first arbitral Award being rendered in 1987.[59] The first cases that were brought to CAS were relating to contracts and damages, sponsorships and doping cases. The IOC has had a pivotal role in assembling and funding CAS which would in the early 90's pose as a problem. A judgement by the Swiss Federal Tribunal pointed out that CAS is too connected financially and organizationally to the IOC and it would be questionable if CAS would be considered an arbitral tribunal at all if a party to the dispute was the IOC.[60]

4.2. The independence of CAS before its reform

In order for CAS to have jurisdiction in a sports-related dispute, the parties need to agree to submit their dispute to CAS. CAS has two main proceedings, an ordinary arbitration proceeding and an appeal proceeding. An arbitration agreement between the parties might be an arbitration clause in a contract, or a separate provision in a statute of a sporting association (ordinary arbitration proceedings) or in

[58] Richard H. McLaren, 'Twenty-Five Years of the Court of Arbitration for Sport: A Look in the Rear-View Mirror Marquette Sports Law Review', [2010] 305, 306 available at: <http://scholarship.law.marquette.edu/cgi/viewcontent.cgi?article=1482&context=sportslaw> accessed 19th July 2019.
[59] *Ibid*; Mathieu Reeb, *Digest of CAS Awards I 1986-1998* (ed Mathieu Reeb, Kluwer Law International 1998) XXIII-XXIV.
[60] *Ibid* 564-575.

the case of an appeal arbitration proceeding, the decision against which the appeal is submitted must be made by a sporting federation which regulations or statutes allow an appeal or the parties concluded a specific agreement.[61]

The Statute of the International Equestrian Federation (FEI) was the first to contain an arbitration clause for appealing the decisions issued by its Judicial Committee and was the first attempt for setting aside a CAS award before the Swiss Federal Tribunal (SFT).[62] Elmar Gundel was an equestrian suspended for three months from all international equestrian competitions for doping his horse.[63] Unsatisfied with the decision of the Judicial Committee of FEI he submitted a public appeal to the SFT and contested the award and requested its annulment on the grounds that it was rendered by a court not established on the principles of independence and impartiality which is necessary in order to be considered a proper arbitration court. The SFT rejected the appeal confirming that the CAS is a true court of arbitration.

However, it gave attention to, *inter alia,* the numerous links between the IOC and CAS and gave the view that these links could potentially be of such significance to call into question the independence of CAS if the IOC should be one of the parties in the dispute.[64] This is due to the fact that CAS's operating costs were borne by the IOC, the IOC has the power to modify the CAS Statute and that the IOC and the president of the IOC had the power to choose 30 of the 60 arbitrators on the list of arbitrators of CAS.[65]

4.3. CAS after the reform

The Elmar Gundel judgement was the trigger for reforming the Court of Arbitration for Sports by firstly revising the CAS Statute, CAS Regulations and creating ICAS (International Council of Arbitration for Sport) to take over the duties from the IOC and seize control over financing and management activities. All of this making CAS more independent from IOC.

The creation of ICAS meant that CAS would become more independent of the IOC because it would serve as a buffer between the relationship of CAS and IOC. The confidence in CAS would grow and the athlete's rights would be safer if CAS was under the control of a different body whose sole goal was to facilitate the resolution of sports-related disputes and to be responsible for administration and financing.[66] After

[61] CAS Code of Sports-Related Arbitration 2019 art R27.
[62] Daniel Girsberger and Nathalie Voser, *International Arbitration: Comparative and Swiss Perspectives* (3rd edn, Schulthess Juristiche Medien AG, Kluwer Law International 2016) 496.
[63] *See* G. v. Fédération Equestre Internationale and Court of Arbitration for Sport (CAS), Federal Tribunal, 1st Civil division, 15 March 1993', in Mathieu Reeb, *Digest of CAS Awards I 1986-1998* (ed Mathieu Reeb, Kluwer Law International 1998) 561-575
[64] *Ibid* 565-571; Despina Mavromati and Mathieu Reeb, *The Code of the Court of Arbitration for Sport: Commentary, Cases and Materials* (Kluwer Law International 2015) 3.
[65] G. v. Fédération Equestre Internationale and Court of Arbitration for Sport (CAS), Federal Tribunal, 1st Civil division, 15 March 1993', in Mathieu Reeb, *Digest of CAS Awards I 1986-1998* (ed Mathieu Reeb, Kluwer Law International 1998) 569-570.
[66] CAS Code of Sports-Related Arbitration 2019 art S2.

the statutory changes and the adoption of the new CAS Code of Sports-Related Arbitration which allowed CAS to be more independent from the IOC, CAS evolved constantly with the number of arbitrators growing to 300 (as in 2014) from the 60 arbitrators in the 80's, creating ad hoc arbitration divisions for specific events and the number of submitted cases exponentially growing.[67]

Although the Swiss Federal Tribunal has upheld numerously that CAS is, in fact, a genuine and independent arbitral tribunal especially after the adoption of the new CAS Statute, a new case in another country turns the attention to these matters from a different perspective, the case of German professional speedskater Claudia Pechstein. The Pechstein case is specific because it covers a long legal battle that spanned for a decade in two different States (Switzerland and Germany) and finally ended at the European Court of Human Rights.

The Pechstein case dealt with a number of issues (*inter alia* the arbitration agreement being void for breaching EU Competition Law and of the dominant position of sports federations compared to the athletes) but ultimately it ended with the main question of the independence of CAS as an institution from sporting federations. The ensuing structural changes in CAS have already occurred with the amendments to the CAS Code of Sports-Related Arbitration and further developments are to be under the direct influence of the Pechstein case.[68]

4.4. CAS procedural rules governing organization of CAS, election of arbitrators, independence and impartiality of arbitrators

The CAS is composed of more than 350 arbitrators (as of January 2020) that are organized by the Court Office and the Secretary General. The arbitrators work in three divisions, two of which were created after the reform of the CAS Code of Sports-Related Arbitration in 1994 and one that started operating in 2019. The first two divisions consist of one Ordinary Division and one Appeal Division in order to distinguish disputes of the first instance that are a result of contract disputes or other acts that trigger the dispute, and disputes that are based on the challenge to decisions rendered by sporting associations or other sporting bodies to which decisions appeal is applicable. Both divisions are headed by a president that is in charge of procedure in the pre-procedural stage while the arbitrators are not still appointed. In addition, the division presidents can issue orders for interim relief if requested by the parties.

The third division is the Anti-Doping Division of the Court of Arbitration for Sport that has been established to hear and decide anti-doping cases as a first-instance authority pursuant to the delegation of powers from the International Olympic Committee (IOC), International Federations of sports on the Olympic program (Olympic IFs),

[67] Despina Mavromati and Mathieu Reeb, *The Code of the Court of Arbitration for Sport: Commentary, Cases and Materials* (Kluwer Law International 2015) 5-7.
[68] Clifford J. Hendel and Gary Smadja, 'A Riff on the Legal Saga of Claudia Pechstein - Litigation as a Sub-Optimal Means of Advancing Transparency and Legitimacy in Sports Arbitration', [2019], Spain Arbitration Review, 109, 116-117.

International Testing Agency (ITA) and any other signatories to the World Anti-Doping Code (WADC).

ICAS has the purpose of facilitating the resolution of sports-related disputes through arbitration or mediation and safeguarding the independence of CAS, the rights of the parties and it is also responsible for the administration and financing of CAS. The composition, attributions and operation of ICAS is regulated by the CAS Code of Sports-Related Arbitration.[69]

ICAS is designated with the power to elect individuals as arbitrators for a period of four years. The appointed personalities to the list of CAS arbitrators need to have appropriate legal training, recognized competence with regard to sports law and/or international arbitration, a good knowledge of sport in general and a good command of at least one CAS working language. The names and qualifications or potential CAS arbitrators are brought to the attention of ICAS by the IOC, the IFs, the NOCs and by the athletes' commissions of the IOC, IFs and NOCs.[70]

Independence and impartiality is a duty that every arbitrator has to obey according to article R33 of the CAS Code of Sports-Related Arbitration that allows no exceptions.

> *"Every arbitrator shall be and remain impartial and independent of the parties and shall immediately disclose any circumstances which may affect her/his independence with respect to any of the parties."*[71]

Apart from the duty of independence and impartiality a CAS arbitrator also needs to have a good command of the language of the arbitration and has the obligation to complete the arbitration expeditiously.[72] These obligations are a part of a wider issue of integrity of CAS arbitrators that are outside the principles of independence and impartiality. The procedure for challenging and replacing an arbitrator is regulated by the CAS Code of Sports-Related Arbitration in articles R34-R36 and the procedure for issuing of provisional and conservatory measures is regulated in article R37.

[69] CAS Code of Sports-Related Arbitration arts S4- S11.
[70] *Ibid* art S14
[71] *Ibid* art R33.
[72] *Ibid.*

5. Specific issues of independence and impartiality in CAS Arbitration

This subsection is divided into analyzing two legally separate but factually connected matters as a follow up on the issues discussed in the previous chapters. Firstly this subsection contains the analysis of the case law of CAS and SFT regarding the challenges to individual arbitrators, setting aside attempts of CAS's arbitral Awards and the decisions thereto. Secondly, it contains an analysis of the Pechstein case, the questions of CAS's status as a court of arbitration and the implications whether or not CAS has independence and impartiality as an institution from various sporting associations.

5.1. Independence and impartiality of arbitrators as viewed by case law of CAS and SFT

The Challenge Commission and ICAS are the competent bodies that deal with challenges on arbitrator's independence and impartiality according to the CAS Code of Sports-Related Arbitration 2019 (the Challenge Commission has the discretion to refer a case to ICAS).[73] ICAS has numerously repeated in its decisions that objective circumstances need to exist that give rise to justifiable doubts to an arbitrator's independence (or impartiality) in order for his removal from a Panel.[74]

> "*an arbitrator may be challenged […] if circumstances exist that give rise to justifiable doubts as to his independence*"[75]

As was emphasized earlier the imperative that an arbitrator was independent and impartial during the arbitral proceedings plays the key role for the credibility of the arbitral Award. An arbitration that fails to obey such important principles fails to be recognized as arbitration at all. The essence of arbitration proceedings is the integrity of the arbitrators. The same exists regarding the integrity of national judges and the credibility of their judgements in national court proceedings.

The SFT as the competent national court in Switzerland has through its case law formed a standing on the topic of independence and impartiality of CAS arbitrators. The conclusion is that arbitrators, the same as national judges need to show sufficient guarantees of independence and impartiality on the basis of Article 30 of the Swiss Federal Constitution which proclaims that *all disputes* need to be solved by an independent and impartial court and if contrary the arbitral Award will not be enforceable in Switzerland.[76] The CAS Code of Sports-Related Arbitration 2019 proclaims that CAS arbitrators shall be and remain impartial and independent of the parties, an obligation which CAS arbitrators appointed to a Panel commit themselves

[73] CAS Code of Sports-Related Arbitration 2019 art R34.
[74] Despina Mavromati and Mathieu Reeb, *The Code of the Court of Arbitration for Sport: Commentary, Cases and Materials* (Kluwer Law International 2015) 139.
[75] CAS Code of Sports-Related Arbitration 2019 art R34.
[76] *Ibid,* emphasis added.

to comply by signing a declaration of independence.[77] Through this declaration, CAS arbitrators commit themselves to "*exercise their functions personally with total objectivity, independence and impartiality, and in conformity with the provisions of this Code.*"[78] An issue in the past of CAS was the inability to challenge an arbitrator that was a CAS member when such a person acted as counsel to the parties in other cases before CAS, however, now the situation is not possible because of the 2010 modified CAS Code of Sports-Related Arbitration which prohibits arbitrators to act as counsel during their mandate in CAS.[79]

As was mentioned in the chapter Independence and impartiality of arbitrators of this work (p. 3 and p. 5) the Swiss Federal Statute on Private International Law 1987 proclaims that arbitrators need to be independent and is silent on the principle of impartiality.[80] The CAS Code of Sports-Related Arbitration was also silent regarding the principle of impartiality until 2013, following the example as in the Swiss PILA, when the CAS Code was revised and the principle of impartiality was added to the CAS code.[81]

The next question is whether the President of the Panel has a higher standard of independence and impartiality than the party-appointed arbitrators that nominated him. Although the CAS Code does not contain a definition of independence and impartiality, regarding the position of the President of the Panel, the CAS and the SFT both agree that the same standard of independence and impartiality applies to all members of the Panel in CAS arbitration.[82]

The case law of CAS regarding the challenges to an arbitrator's independence and impartiality in sports arbitration follows the trends of the more renowned institutional arbitrations such as ICC Arbitration, LCIA etc. and follows the recommendations in the IBA Guidelines. The case law provides insight into how the Challenge Commission, ICAS and SFT stand regarding the criteria for removal of an arbitrator from the Panel.

Such as in commercial arbitration, past professional relationships with a party to a dispute or the previous appointments into Panels by the same party, may cause reasonable doubt to the arbitrator's independence only if there is an economic tie among them.[83] It is only reasonable that challenges such as these should be rejected because the community of sports arbitration is a small and relatively closed circle. The CAS Code of Sports-Related Arbitration 2019 prohibits any other individual besides the individuals on the closed lists of CAS to be an arbitrator in its proceedings, therefore, the small number of sports law experts are bound to have some kind of professional or personal relationship among themselves and among lawyers that frequently appear in CAS arbitration.

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[77] CAS Code of Sports-Related Arbitration 2019 art S18 para 2.
[78] *Ibid.*
[79] *Ibid,* art S18 para 3.
[80] Swiss Federal Statute on Private International Law 1987 (Swiss), art. 180, para. 1, subpara. c).
[81] Despina Mavromati and Mathieu Reeb, *The Code of the Court of Arbitration for Sport: Commentary, Cases and Materials* (Kluwer Law International 2015) 136.
[82] *Ibid*, 138.
[83] *Ibid.*

In one doping case (the most frequent type of disputes before CAS) one of the arbitrators in the Panel was involved in the drafting of the World Anti-Doping Code (hereinafter: WADA Code) and one of the respondents in the dispute was the World Anti-Doping Agency. The Appellant cast doubts as to the arbitrator's independence because of his previous engagement in the drafting of the WADA Code. The ICAS and the SFT concluded that the doubts to the independence of the arbitrator would have been an issue if the arbitration was taking place at the same time as the drafting of the WADA Code, however, given the fact that this was a previous engagement that has ended there were no more economic or emotional ties of the arbitrator to WADA and the Appellant's appeal was rejected.[84]

Sports arbitration is inevitably connected to sporting associations. Whether on the respondent side or the claimant side, one of the parties in sports arbitration is inevitably a sporting association (most often more sporting associations jointly). Sporting associations such as FIFA, UEFA or FIA have great influence in their sport and as such have the possibility to influence an arbitrator far more than an athlete in the dispute. This is why an arbitrator could be removed from a case if he is an official of the league in which the athlete took part and also if the arbitrator that was appointed by a respondent is an official of a national sporting association to which the respondent is an indirect member it suffices that the legitimate doubts to his independence exist.[85] If the arbitration proceedings are led by a sole arbitrator that is an opponent of the party's counsel in a civil procedure that does not have any connections to the present arbitration proceeding, in the absence of other facts it is insufficient to deem an arbitrator dependent or biased merely by being on the opposing side in a civil procedure.[86]

An arbitrator's articles or comments that were published in journals are evidence of potential bias if they show that he has already formed a view regarding the case at hand. Such behavior by an arbitrator could lead to him being removed from the Panel. However, articles or comments need to be a personal view of the case at hand. Publishing an article or book on sports law and certain problems in sports law that arise regularly or are a current topic in the professional discussions does not constitute a ground for removing an arbitrator.[87]

The SFT has accepted as lawful a situation when an arbitrator was previously a member of a CAS Panel that confirmed a breach of contract, and afterwards, the same arbitrator is now a member of a Panel designated to deal with consequences of the

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[84] *Alejandro Valverde Belmonte v. Comitato Olimpico Nazionale Italiano (INOC) & et al.* [2010] SFT 4A_234/2010, English version available at: < http://www.swissarbitrationdecisions.com/sites/default/files/29%20octobre%202010%204A%20234%202010.pdf> accessed at 15th January 2019.

[85] Despina Mavromati and Mathieu Reeb, *The Code of the Court of Arbitration for Sport: Commentary, Cases and Materials* (Kluwer Law International 2015) 140.

[86] *Ibid.*

[87] *Ibid* 141.

same breach of contract (even though this situation is in the Waivable Red List of the IBA Guidelines).[88]

The parties to the dispute have to be active. They have to act promptly, investigate and challenge the arbitrator's independence as soon as they find out that reasonable doubts exist. The SFT has upheld this „*duty of curiosity*" on the side of the parties and concluded that the parties should raise a challenge immediately, pointing out that in case a party appoints an arbitrator frequently and if the opposing party's counsel is a specialist of sports arbitration the „*duty of curiosity*" is even more emphasized because the counsel is aware of the recurrent relationship of the arbitrator and the other party (the arbitrator in question was appointed more than seven times in a period of two years).[89]

Regarding the nationality of the arbitrator, it is common practice that if the arbitration proceeding is led by a Panel of three arbitrators that the party-appointed arbitrators be of the same nationality as the parties that appointed them. The President of the Panel and a sole arbitrator are not forbidden by CAS Code to be the same nationality as one of the parties, therefore it is possible, however, this situation is generally avoided.[90]

5.2. Independence and impartiality of CAS itself: The Pechstein case

Unlike other institutional arbitrations, the Court of Arbitration for Sport has a specific issue that has been at the center of many setting aside attempts of its arbitral Awards. When a party to a dispute believes that an arbitral Award was rendered by a dependent or biased arbitrator or arbitral tribunal the setting aside attempt is directed at the specific arbitrators and only if there is a sufficient level of proof, with the burden of proof being on the party alleging that such circumstances exist. Another common condition is that the party had already unsuccessfully challenged the independence and impartiality of an arbitrator during the arbitral proceedings. CAS has a procedure for challenging individual arbitrators in its Statute.[91] In CAS arbitration all arbitrators appointed to a case sign a declaration of independence through which they accept their duty to objectively and independently carry out their duties as arbitrators.[92] However, the issues that are specific to CAS arbitration are not on an individual arbitrator level but on an institutional level.

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[88] *Adrian Mutu v. Chelsea Football Club Ltd,* [2010] SFT 4A_458/2009, English version available at: < http://www.swissarbitrationdecisions.com/sites/default/files/10%20juin%202010%204A%20458%202020 09.pdf > accessed at 15th January 2019.

[89] *X. v. International Cycling Union (ICU) et al.,* [2012] SFT 4A_110/2012, English version available at: < http://www.swissarbitrationdecisions.com/sites/default/files/9%20octobre%202012%204A%20110%20 2012_0.pdf > accessed at 15th January 2019.

[90] Despina Mavromati and Mathieu Reeb, *The Code of the Court of Arbitration for Sport: Commentary, Cases and Materials* (Kluwer Law International 2015) 143-144.

[91] CAS Code of Sports-Related Arbitration 2019 arts R33-R36.

[92] Despina Mavromati and Mathieu Reeb, *The Code of the Court of Arbitration for Sport: Commentary, Cases and Materials* (Kluwer Law International 2015) 135.

The question is whether CAS structurally is dependent on sporting federations such as the International Olympic Committee. These links to sporting federations make the question of the independence and impartiality of individual arbitrators pointless because the question arises whether CAS is capable of guaranteeing the minimum of rights to individuals in order to be an arbitral tribunal at all?

Ms Claudia Pechstein is a German speed skater whose disciplines are 3,000 and 5,000 meters, her results are admirable (nine Olympic medals, five of which are gold medals) and she is one of the greatest winter sports athletes of all time.[93] Ms Pechstein's legal battle began in 2009 after the International Skating Union (ISU), which is seated in Lausanne, Switzerland and governed under laws of Switzerland, suspended her for two years from competition for an anti-doping violation after which she submitted an appeal against that decision to CAS, according to the ISU Statute.[94] The CAS rejected Ms Pechstein's appeal and confirmed the two-year suspension. In the arbitral Award CAS briefly touched upon the question of jurisdiction concluding that the parties explicitly recognized the jurisdiction of CAS in their briefs and, more interestingly, the parties signed the Order of Procedure (which would later be one of the reasons why the SFT rejected Ms Pechstein's setting aside attempt).[95]

Unsatisfied with the arbitral Award of CAS, Ms Pechstein decided to change the venue and went to the Swiss Federal Tribunal with an attempt to set aside the arbitral Award claiming *inter alia* that the CAS itself lacks independence.[96] The ground for challenging the independence of arbitrators is possible pursuant to article 190 (2)(a) of the Swiss Federal Statute on Private International Law (PILA) whereby an illegal composition of an arbitral tribunal is sufficient for challenging an arbitral Award. However, such an objection must be made immediately in accordance with the principle of good faith, otherwise, it is assumed that the right to invoke that ground for appeal is forfeited.[97] The SFT concluded that given the facts of the case, most importantly that Ms Pechstein herself accepted CAS and submitted an appeal to CAS and signed the Order of Procedure, it would be contrary to the principle of good faith to raise the issue of independence before the SFT as a public appeal under the PILA. The SFT rejected Ms Pechstein's challenge.

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[93] *P. v. International Skating Union* CAS2009/A/1912 & *Deutsche Eisschnelllauf Gemeinschaft e.V. (DESG) v. International Skating Union (ISU)* CAS 2009/A/1913, [2009] 2-3; Clifford J. Hendel and Gary Smadja, 'A Riff on the Legal Saga of Claudia Pechstein - Litigation as a Sub-Optimal Means of Advancing Transparency and Legitimacy in Sports Arbitration', [2019], Spain Arbitration Review, 109, 111-112.

[94] The applicants in the joined case were Claudia Pechstein and the Deutsche Eisschnelllauf Gemeinschaft (DESG) which is the German national federation governing speed skating and the respondent is ISU. The DESG is a member of ISU.

[95] *P. v. International Skating Union* CAS2009/A/1912 & *Deutsche Eisschnelllauf Gemeinschaft e.V. (DESG) v. International Skating Union (ISU)* CAS 2009/A/1913, [2009] para 3.

[96] *Claudia Pechstein v. International Skating Union et. al,* SFT, 4A_612/2009, [2010], para 3.1. available at <http://www.swissarbitrationdecisions.com/sites/default/files/10%20fevrier%202010%204A%20612%202009.pdf> accessed at 18th August 2019; in her appeal, Ms Pechstein claimed that: 1) CAS itself was not independent, 2) the president of the arbitral tribunal was biased, 3) the IOC could have influenced the arbitral proceedings, 4) her right to a public hearing was injured and 5) her right to be heard was injured.

[97] *Ibid* para 3.1.2

Another ground for setting aside CAS's arbitral Award was the alleged refusal of CAS to grant a public hearing to Ms Pechstein by not allowing her manager to be present during the hearings, contrary to her wishes.[98] The SFT concluded that the right to a public hearing is not applicable to voluntary arbitration proceedings which are not public as a rule and rejected this ground also but surprisingly the court noted that given the significance of CAS arbitration in the world of professional sports it *would be desirable for a public hearing to be held on the request of the athlete concerned* even without the consent of all of the parties to the dispute.[99]

By exhausting all legal remedies in Switzerland Ms Pechstein rather tenaciously continued her legal battle before the European Court of Human Rights (ECtHR) and in the courts of her country. In 2012 while the proceedings before the ECtHR were still pending she submitted a claim before the German Court ("LG München") against DESG and ISU, suing them for damages that were a result of an unlawful doping ban in the amount of more than EUR 3.5 million.[100]

The decision of LG München gained wide attention because the Court found that the arbitration agreement *per se* was invalid due to the monopolistic structure of ISU which did not give athletes a choice other than to sign the agreement, thereby lacking consent.[101] However, the LG München dismissed the claim due to the *res judicata* effect of the CAS arbitral Award because Ms Pechstein neglected to challenge the arbitration agreement during the earlier stage in the arbitral proceedings.

Ms Pechstein appealed the decision of the LG München before the Munich Court of Appeals (OLG München) which rendered a landmark interim judgment on January 2015.[102] The OLG München concentrated on the issue of the admissibility of Ms Pechsteins claim as to the arbitration agreement between her and ISU. The Court concluded the same as the LG München that the arbitration agreement is void however not because of a lack of consent of the athlete but because it is contrary to German Competition Law.[103] In its judgment the OLG München was of the opinion that ISU has a monopoly in its relevant market (in the sport of ice speed skating) and it imposed an arbitration agreement on an athlete which is not unlawful *per se* given the specific roles of sports associations in the world of sports, however, the OLG München pointed at certain structural misbalance in the process of selection of arbitrators

[98] *Ibid* para 4
[99] *Ibid* para 4.1
[100] Despina Mavromati, 'The Legality of the Arbitration Agreement in favour of CAS under German Civil and Competition Law - The Pechstein Ruling of the German Federal Tribunal (BGH) of 7 June 2016', [2016], 1, 2 available at: <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2800044> accessed at 18th August 2019.
[101] *Ibid* 2-3.
[102] *Ibid* 3.
[103] *See* Xavier Favre-Bulle, 'Pechstein v. Court of Arbitration for Sport: How Can We Break the Ice?' (eds Christoph Müller, Sébastien Besson and Antonio Rigozzi, *New Developments in International Commercial Arbitration 2015*, Schulthess 2015) 322-324;

before the CAS which altogether constitute a violation of Art. 19 of the German Competition Law.[104]

OLG München concluded that the majority of arbitrators on the CAS closed lists are appointed by organizations of sporting associations. The OLG München, therefore, concluded that it has jurisdiction over Ms Pechstein's claim and continued to address the effects of the CAS arbitral Award based on the void arbitration agreement by verifying the conditions for recognition and enforcement according to the New York Convention. According to German Law and art. V (2)(b) of the New York Convention recognition and enforcement of an arbitral Award may be denied if it is contrary to public policy and, according to the OLG München, fundamental provisions of Competition Law fall within the scope of German public policy.[105] The reasoning of the OLG München was that by imposing the arbitration agreement on Ms Pechstein, ISU abused its dominant position which is prohibited by German Competition Law, hence the CAS arbitral Award that upheld such an arbitration agreement could not be recognized and enforced in Germany.[106] By denying *res judicata* effect of the CAS arbitral Award the German Courts are allowed to examine the facts of the case in the merits, making Ms Pechsteins case admissible in Germany.

This judgment sent 'shock waves' through the world of sports arbitration.[107] The decisions of both the LG München and OLG München were criticized by professional arbitrators related to the possible limits of reviewing a final and binding foreign arbitral Award by a domestic court.[108] Finally, the legal saga of Ms Pecshtein ended with the judgement of the German Federal Court of Justice (BGH) in 2016.[109] The BGH reversed the OLG München decision, confirming the independence and impartiality of the CAS and the validity of the arbitration agreement, rejecting the lower Courts view that the arbitration agreement was imposed by the abuse of a dominant position of a sporting association and that CAS has a structural misbalance to the detriment of athletes.[110]

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[104] *Ibid* 323; Despina Mavromati, 'The Legality of the Arbitration Agreement in favour of CAS under German Civil and Competition Law - The Pechstein Ruling of the German Federal Tribunal (BGH) of 7 June 2016', [2016], 1, 2 available at: <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2800044> accessed at 18th August 2019.

[105] Xavier Favre-Bulle, 'Pechstein v. Court of Arbitration for Sport: How Can We Break the Ice?' (eds Christoph Müller, Sébastien Besson and Antonio Rigozzi, *New Developments in International Commercial Arbitration 2015*, Schulthess 2015) 324.

[106] *Ibid* 324.

[107] Clifford J. Hendel and Gary Smadja, 'A Riff on the Legal Saga of Claudia Pechstein - Litigation as a Sub-Optimal Means of Advancing Transparency and Legitimacy in Sports Arbitration', [2019], Spain Arbitration Review, 109, 115.

[108] *See* Xavier Favre-Bulle, 'Pechstein v. Court of Arbitration for Sport: How Can We Break the Ice?' (eds Christoph Müller, Sébastien Besson and Antonio Rigozzi, *New Developments in International Commercial Arbitration 2015*, Schulthess 2015) 328-330.

[109] *Claudia Pechstein v. International Skating Union et. al,* German Federal Court of Justice KZR 6/15, [2016], 5, English translation available at https://www.tas-cas.org/fileadmin/user_upload/Pechstein___ISU_translation_ENG_final.pdf accessed at 18th August 2019.

[110] *Ibid.*

5.3. The current status of CAS: Does CAS qualify as an institutional court of arbitration at all?

At the center of the attention of many professional sports arbitration practitioners was defining the consequences of the interconnection of CAS with sporting associations, mostly the IOC which played a crucial role during the creation of CAS (see p. 17) and the consequences these connections could have on the status of CAS as a court of arbitration. The BGH ruling in the Pechstein case brought back the *status quo* in international sports arbitration (if it were otherwise the ruling would have had serious effects on international commercial arbitration also, most notably due to its conclusion relating to the validity of the incorporation-by-reference arbitration clause, which is used quite frequently in businesses worldwide) and the reactions to the decision of the BGH were divided, with some legal experts criticizing the BGH for taking the side of SFT and missing the opportunity to influence the CAS to instigate a new reform.[111]

The epilogue of the Pechstein case was that CAS was, at one time during the post-award phase, basically denied the status of a court of arbitration by a national court because of the inferior position of athletes in the pre-arbitration phase which cumulates with certain structural misbalance in the process of selection of arbitrators before CAS. The structural misbalance was caused because the sporting associations had more to say while the list of arbitrators of CAS was being formed. This did not *per se* cause the OLG München to deny CAS the status of a court of arbitration but in connection with other facts among which the incorporation-by-reference arbitration clause in sporting association's statutes was the most important. The incorporation-by-reference arbitration clause in sporting association's statutes is forced upon athletes if they wish to join the sporting association and be a professional athlete.

These two facts caused the OLG München to deny recognition and enforcement of the CAS arbitral Award in the Pechstein case because they suffice to be contrary to public policy and, according to the OLG München, fundamental provisions of Competition Law, which fall within the scope of German public policy. This means that even private law instruments such as statutes of sporting associations could have possible effects to the validity of a final arbitral Award in the post-award phase if they contain an arbitration clause and if the court of arbitration that rendered the arbitral Award had certain issues in its formation to the detriment of the "weaker" party.

CAS has instigated a reform as a consequence of the aforementioned Pechstein case targeting the structural imperfections that seem to be a constant struggle for CAS since its foundation. The CAS believes that the closed lists of arbitrators should be kept because they are beneficial to everyone as they allow specialization in sports

[111] *See* Antoine Duval, 'The BGH's Pechstein Decision: A Surrealist Ruling', (Asser International Sports Law Blog 2016), <https://www.asser.nl/SportsLaw/Blog/post/the-bgh-s-pechstein-decision-a-surrealist-ruling> accessed at 27th July 2019; For a different opinion *see* Despina Mavromati, 'The Legality of the Arbitration Agreement in favour of CAS under German Civil and Competition Law - The Pechstein Ruling of the German Federal Tribunal (BGH) of 7 June 2016', [2016], 1, 13-15 available at: <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2800044> accessed at 18th August 2019.

arbitration and allow further evolution of *lex sportiva* through the individual quality of arbitrators. The target of the reforms should, therefore, be in the area of the election of arbitrators to the closed list of CAS so as to allow a more balanced representation of athletes.

The steps that CAS has taken were the revision and elimination of the quotas for IOC and other sporting organizations which could suggest the nomination of arbitrators for the CAS closed lists of arbitrators (article S14 of the CAS Code of Sports-Related Arbitration that was examined the most by the OLG München).[112] CAS has since 2012 acknowledged that it would be beneficial if former professional athletes could be arbitrators and took measures to encourage and educate former athletes to be arbitrators before CAS. CAS also formed a legal aid fund for athletes that could not afford to finance a case before CAS in order to help them access justice in CAS. All these measures were taken with the goal of leveling the balance of power between sporting associations and individual athletes.

Even though the BGH ruling in the Pechstein case brought back the *status quo* in CAS and reaffirmed that CAS is a genuine court of arbitration, further measures should be taken to clear out any potential danger that another national court might refuse recognition or enforcement of CAS's arbitral Awards.

[112] *Ibid* 14-15.

6. Conclusions

Independence and impartiality of arbitrators in CAS and the status, the standards of proof, definitions and case law in sports arbitration *per se* is mostly similar to the practice of institutional arbitrations in commercial matters. The different decisions on challenges to independence and impartiality of arbitrators in certain cases before CAS come from the characteristics of the structure of CAS itself as an institution and not due to sports law as a specific area of law or different rules of procedure. Therefore, individually an arbitrator could be challenged for the same reasons as in any other arbitration proceeding. The outcomes of challenges are also similar to other commercial arbitration proceedings because they follow the best practice and recommendations that are codified in the IBA Guidelines. The IBA Guidelines allow for more legal certainty and they are applied frequently in sports arbitration if the opportunity exists. Also, the obligations of arbitrators in CAS are similar to those of any other institutional arbitration, with independence and impartiality being defined in article R34 of the CAS Code of Sports-Related Arbitration 2019 so as to allow flexibility to the Challenge Commission and ICAS when deciding on a challenge.

There are two main reasons that forced a large number of athletes to challenge arbitral Awards of CAS. The first reason was an institutional and structural matter of CAS itself, the disproportionate power of arbitrator nomination to the CAS closed lists is what triggered set aside attempts because the athletes felt that they do not have a say when choosing an arbitrator. The second reason is that athletes before even starting an arbitration proceeding are in an unequal position with their sporting associations. They need to join a club or another sporting organization in order to play their sport and by joining they need to accept all terms and conditions of the clubs and sporting associations and it goes even further so as to be obliged to comply with the rules of higher instance international sporting associations which their clubs are directly or indirectly members of.

According to many authors the BGH missed the opportunity in the Pechstein case to influence CAS to instigate a new reform and shed light on the problematic structural matters of CAS.[113] Some even go as far as to say that the BGH ruling *"could have had important systemic repercussions for arbitration in general, as it could jeopardise the legal certainty that arbitral awards made in Switzerland offer."*[114]

In my opinion, the BGH ruling in the Pechstein case were it different and upheld the lower court's decision to deny recognition and enforcement CAS's arbitral Award, it would not have had the desired effects to change the whole concept of sports

[113] Antoine Duval, 'The BGH's Pechstein Decision: A Surrealist Ruling', (Asser International Sports Law Blog 2016), <https://www.asser.nl/SportsLaw/Blog/post/the-bgh-s-pechstein-decision-a-surrealist-ruling> accessed at 27th July 2019.

[114] Despina Mavromati, 'The Legality of the Arbitration Agreement in favour of CAS under German Civil and Competition Law - The Pechstein Ruling of the German Federal Tribunal (BGH) of 7 June 2016', [2016], 1, 14 available at: <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2800044> accessed at 18th August 2019.

arbitration. The reason is that the BGH ruling could have only been beneficial to German athletes because they could have, ideally, chosen to go directly to German national courts and surpass CAS which, from the aspect of German courts, would not have been considered a court of arbitration. The BGH could only consider the Award through German civil and competition law. Athletes from other countries could not avoid CAS because the status of CAS from the perspectives of other countries would not have changed.

Another reason why an alternative ruling of BGH would have had minor global effects to CAS's arbitral Awards is that the BGH examined the 2004 CAS Code of Sports-Related Arbitration which was applicable back then. The effects of the BGH ruling would be bound to the CAS Code of Sports-Related Arbitration 2004 which could be revised and the *status quo* would be inevitably restored again because any other subsequent case before a German court would have to go through the same review as in the Pechstein case, but now with a newly revised CAS Code that does not have the said issues. Even if the BGH ruled differently it should be kept in mind that these effects would be bound only to Germany because international sports arbitration is an imperfect necessity that has no alternatives at this moment and is universally accepted by all countries, a status that would not have changed.[115]

The real question was: should foreign national courts examine a foreign arbitral Award with such thoroughness and way out the balance of power among the parties? This could arise the question whether or not an athlete as the "weaker" party should have more protection from national courts and would raise the possible limits of reviewing a final and binding foreign arbitral Award in the post-award phase, which is exactly opposite of what arbitration, in general, seeks to achieve.

In the EU legal system disputes arising out of labour law are common, however mandatory labour law arbitration such as in the US is not allowed by public policy in a number of EU countries (e.g. France and the Netherlands). Unlike labour law, in sports law, mandatory arbitration is accepted. It is accepted even though professional athletes share many similarities to common workers, such as small bargaining power against their employer, they have salaries, training (working) hours, etc. Because of these characteristics, athletes feel like they are in an inferior position to sporting associations and even if they wish to seek court help, they are obliged to firstly rely on the mechanisms of dispute resolution that are incorporated in the statutes of their clubs and associations, without national court recourse. They are obliged to rely on a dispute resolution mechanism which is unfamiliar to them and they know as a fact that their club's association, i.e. the opposing party in the dispute, has more practice in CAS arbitration which is why they assume that the small number of arbitrators will be in the latter's favour through mutual acquaintance.

None of the aforementioned circumstances alone are enough to deny enforcement of a final and binding arbitral Award, however, all of them together could raise the matter to be contrary to public policy and the lawfulness of the arbitration agreement. If the structural misbalances of CAS, or any other institutional arbitration, are to such

[115] *Ibid.*

an extent to deny a potential party access to a lawful proceeding (among which being heard by an independent and impartial Panel of arbitrators is the condition *sine qua non* for a lawful proceeding) which is additionally aggregated by a multi-sided unfavourable factual background to the detriment of the "weaker" party, than the arbitration may be refused the status of arbitration completely.

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